No. 85-2115

In the Supreme Court of the United States

October Term, 1985

WHITTAKER CORPORATION,

Petitioner,

v.

PERRY D. JENKINS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondent's opposition to the Petition for Writ of Certiorari urges, *inter alia*, that the petition be denied because (i) the court below did not address whether military contractors should be immune from civil damage suits by members of the Armed Forces for service related injuries, (ii) the immunity issue is not worthy of certiorari because immunity would be inappropriate and, (iii) assuming that military contractors are not immune from such suits, application of federal common law would have made no difference in the ultimate result. Whittaker submits that none of those reasons warrant a denial of the petition.

Whittaker's petition also sought certiorari on a question concerning prejudgment interest. Respondents'

opposition concedes a conflict a[illegible]g the circuits, but seeks to "distinguish" the cases. Since respondents raise no new points, no reply will be made by Whittaker on this issue.

I

FAILURE BY THE COURT BELOW TO CONSIDER THE ISSUE OF MILITARY CONTRACTOR IMMUNITY FROM CIVIL DAMAGE SUITS BASED UPON INJURY TO OR DEATH OF MEMBERS OF THE ARMED FORCES IN THE COURSE OF MILITARY SERVICE DOES NOT PRECLUDE CONSIDERATION OF THAT ISSUE BY THIS COURT

Whether members of the Armed Forces or their representatives can maintain a civil damage suit against military contractors for service related injuries raises nothing more than whether a claim upon which relief can be granted was stated. That type of question is a pure issue of law. *State of Georgia v. Wenger,* 187 F.2d 285, 287 (7th Cir. 1951), *cert. denied,* 342 U.S. 822 [72 S.Ct. 41, 96 L.Ed 621] (1951), *rehearing denied,* 342 U.S. 874 [72 S.Ct. 105, 96 L.Ed 657] (1951). This Court has recognized that when a pure issue of law is presented, and when no useful purpose would be served by first securing consideration of that issue by the court of appeals, the issue is appropriate for immediate resolution by this Court. *Nixon v. Fitzgerald,* 457 U.S. 731, 743 n.23 [102 S.Ct. 2690, 2698 n. 23, 73 L.Ed.2d 349] (1982).

Moreover, while it is true that "normally" this Court will not consider questions not raised[1] or resolved in

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[1]Whittaker did raise the defense of failure to state a claim upon which relief can be granted in its Answer to Complaint. (Appendix A-1 to Brief in Opposition to Petition for Writ of Certiorari.)

the lower court, *Adickes v. S.H. Kress and Company,* 398 U.S. 144, 147 n.2 [90 S.Ct. 1598, 1602-1603 n.2, 26 L.Ed.2d 142] (1970), "the rule is not inflexible." *Youakim v. Miller,* 425 U.S. 231, 234 [96 S.Ct. 1399, 1401, 47 L.Ed.2d 701] (1976).

In this case no useful purpose would have been, or will be, served by first having the court below consider the question of military contractor immunity. The court below has already indicated *in dicta* a position against such immunity for manufacturing defects. *McKay v. Rockwell Intern. Corp.,* 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied,* 464 U.S. 1043 [104 S.Ct. 711, 79 L.Ed.2d 175] (1984).

Given, therefore, the pure issue of law presented by the question of military contractor immunity, the inherent power of this Court to consider that issue, and that no useful purpose would be served by having the court below consider the issue, the fact that the court below did not expressly consider the issue in this case does not preclude consideration of the issue by this Court.

II

THE ISSUE OF MILITARY CONTRACTOR IMMUNITY FROM CIVIL DAMAGE SUITS BASED UPON INJURY TO OR DEATH OF MEMBERS OF THE ARMED FORCES IN THE COURSE OF MILITARY SERVICE SHOULD BE CONSIDERED BY THIS COURT BECAUSE OF POLICY CONSIDERATIONS UNIQUE TO THE MILITARY

Respondents' position that the issue of military contractor immunity from civil damage suits based upon injury to or death of members of the Armed Forces in the course of military service is "not worthy of

certiorari" results from an erroneous assumption that the policy considerations set forth in *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666 [97 S.Ct. 2054, 52 L.Ed.2d 665] (1977), and *Feres v. United States,* 340 U.S. 135 [71 S.Ct. 153, 95 L.Ed. 152] (1950), are only applicable to suits seeking to impose liability on the Government. That assumption is unfounded. *See Tozer v. LTV Corporation,* No. 84-1907(L) (4th Cir. 5/27/86) (Appendix H, at 6-9).

Among the policy considerations underlying *Feres* and *Stencil Aero* is that members of the Armed Forces should not be required to testify in court as to each other's decisions and actions. This is a policy consideration applicable to suits by members of the Armed Forces against individuals. *Chappell v. Wallace*, 462 U.S. 296 [103 S.Ct. 2362, 76 L.Ed.2d 586] (1983); *Tozer v. LTV Corporation, supra.* It is the specter of a trial involving this kind of testimony, not who is ultimately liable, which is the concern of this Court. *United States v. Shearer,* ___ U.S. ___ [105 S.Ct. 3039, 3043-3044, ___ L.Ed.2d ___] (1985). See also *Bozeman v. United States*, 780 F.2d 198, 201-202 (2d Cir. 1985).

In the instant case, eleven members of the Armed Forces testified. Some members were critical of other members decisions and actions. The adequacy of training, preparation, and supervision, as well as the adequacy of the officer in charge, were placed in issue for the jury to consider.[2] This type of litigation will continue to pit members of the Armed Forces against each other as manufacturers defend cases by urging that training was inadequate and that military personnel were

[2]Two examples of such testimony elicited during discovery for use at trial are attached as Appendices I (Colonel John Michael Moerls) and J (former Sergeant Thomas Charles Dappert). Portions of the depositions were read to the jury.

incompetent. Surely, with all of its other responsibilities and problems, the military does not need its personnel involved in civil damage suits, with their attendant discovery, wherein military personnel can criticize and blame each other for an accident which occurred in the course of military service. As evidenced by reported opinions, the number of these types of suits is escalating. The time has come to consider whether they should be allowed.

As for manufacturer responsibility for manufacturing defects, Whittaker has not suggested that manufacturers be absolved of all responsibility. Rather, the issue is to whom should the military contractor have to answer. Whittaker submits it should only be to the Government because of the military policy considerations heretofore recognized by this Court. Moreover, the remedies available to the Government include not only monetary relief, but also severe penalties (e.g. debarment).

III

FEDERAL COMMON LAW WOULD HAVE COMPELLED A DIFFERENT RESULT THAN THE RESULT DICTATED BY HAWAII LAW

Respondents contend that federal common law would have made no difference in this case. The fact is that the court below, whose opinion respondents laud, stated that, "the difference in the laws would significantly affect major issues in the case . . . " (Appendix A to Petition for Writ of Certiorari, at 6 n.4). The court below knew, when it made that statement, that it was dealing with a manufacturing defect case.

One clear difference flows from the application of the doctrine of *res ipsa loquiter*. Respondents correctly note that *res ipsa loquiter* is recognized in admiralty law,

Cox v. Northwest Airlines, Inc., 379 F.2d 893, 895 (7th Cir. 1967), *cert. denied*, 389 U.S. 1044 [88 S.Ct. 788, 19 L.Ed.2d 836] (1968), but go on to suggest that *res ipsa loquiter* as recognized in admiralty law is identical to *res ipsa loquiter* as recognized by Hawaii law. That is not the case.

Under Hawaii law *res ipsa loquiter* can be used even if the injury-producing instrumentality was not under the control and management of the defendant at the time of the accident. (Appendix A to Petition for Writ of Certiorari, at 19-20) In *Cox*, however, the court found that the instrumentality which produced the death was under the exclusive control and management of the under the exclusive control and management of the respondent. *Cox v. Northwest Airlines, Inc., Supra* at 894. *Accord, Asprodites v. Standard Fruit & Steamship Co.*, 108 F.2d 728, 729, (5th Cir. 1940), *cert. denied*, 310 U.S. 642 [60 S.Ct. 1089, 84 L.Ed. 1410] (1940) (*res ipsa loquiter* not applicable to ship owner because thing that caused injury was under the exclusive control and management of injured party when accident occurred);[3] *Cruse v. Sabine Transp. Co., Inc.*, 88 F.2d 298, 300 (5th Cir. 1937), *cert. denied*, 302 U.S. 701 [58 S.Ct. 20, 82 L.Ed. 541] (1937) rehearing denied, 302 U.S. 775 [58 S.Ct. 134, 82 L.Ed. 600] (1937) (*res ipsa loquiter* inapplicable because vessel not in the exclusive control of owners at time of explosion).

In addition, Hawaii law allowed the use of *res ipsa loquiter* despite evidence of an equally plausible explanation for the second explosion which did not involve the Whittaker simulator (Appendix A to the

[3]In the instant case the simulator was under the exclusive control and management of the decedent and his fellow servicemen when the accident occurred.

Petition for Writ of Certiorari, at 20-21, n.26). Admiralty law does not allow application of the doctrine under these circumstances. *Luckenbach S.S. Co. v. Buzynski*, 31 F.2d 1015 (5th Cir. 1929), *cert. denied*, 279 U.S. 867 [49 S.Ct. 483, 73 L.Ed. 1004] (1929) (*res ipsa loquiter* inapplicable where cause of accident is a matter of mere speculation and conjecture.)

Thus, the fact that the doctrine of *res ipsa loquiter* would be recognized as a part of federal common law does not mean that federal common law would adopt Hawaii's standards for use of the doctrine. To the extent that admiralty law were used to define federal common law, Hawaii's standards would not be followed. Without the aid of *res ipsa loquiter*, respondents could not have prevailed. Federal common law would, therefore, have produced a significantly different result.[4]

This Court has consistently stated in *Feres* and *Stencil Aero* that the local law of the various states should not define the extent of rights and remedies where military considerations are involved. It recently reaffirmed that view in *United States v. Shearer*, ___ U.S. ___ [105 S.Ct. 3039, 3043-3044 n.4, ___ L.Ed.2d ___] (1985). Consistent with that view the time has now come to consider at least whether the local law of the various states should continue to govern military contractor liability to members of the Armed Forces or their representatives for service related injuries, or whether one uniform federal common law would be more appropriate.

[4]The court below expressly recognized that choice of law would also affect other issues apart from *res ipsa loquiter* (e.g. (i) what standard will govern the timeliness of suit; (ii) would federal common law adopt strict liability and warranty theories of liability in this type of suit; and (iii) what types of damages would be recoverable.) Appendix A to Petition for Writ of Certiorari at 6, n.4.

IV

ISSUES RAISED BY THIS PETITION ARE RELATED TO ISSUES RAISED BY THE PETITION FOR WRIT OF CERTIORARI IN *GRUMMAN AEROSPACE CORPORATION V. SHAW*, NO. 85-1529

Subsequent to Whittaker filing its Petition for Writ of Certiorari, it learned of the Petition for Writ of Certiorari in *Grumman Aerospace Corp. v. Shaw*, No. 85-1529. While *Grumman* involves the appropriate standard for defining the military contractor defense for design defects,[5] to the extent that *Grumman* raises questions of a lay jury second guessing military decisions and requests a uniform standard for the defense, it raises issues which are related to those raised by Whittaker concerning civil damage suits involving a need to second guess military decisions and the need for a uniform federal common law if these suits are to be allowed.

V

CONCLUSION

Whittaker's Petition for Writ of Certiorari presents questions left unanswered by *Feres* and *Stencil Aero*. Without guidance by the Court as to whether and, if so, under what circumstances military contractors can be subjected to civil damage suits by members of the Armed Forces for service related injuries, the number of civil damage suits against military contractors will continue to escalate. The policy considerations of *Feres* and *Stencil Aero*, as well as the nation's defense procurement policy, will *sub silentio* fall victim to them.

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[5]The question of design defect was submitted to the jury in this case. The jury found no design defect.

Given the well developed bodies of, on the one hand, state tort, product liability, and warranty law and, on the other hand, admiralty law, this Court is now in a position to address the military contractor issues presented herein. *See East River Steamship Corp. v. Transamerica Delaval Inc.*, ___ U.S. ___ [___ S.Ct. ___, ___ L.Ed.2d ___] (1986). Moreover, nine years have passed from the time this Court last considered issues involving military contractor liability with respect to civil damage suits by members of the Armed Forces for service related injuries (*Stencil Aero*). In that nine years, there has been both an escalation of this type of suit and a resulting product liability-insurance crisis. The time is, thus, ripe for consideration by this Court of the issues presented in this petition.

For these reasons, as well as those set forth in the Petition for Writ of Certiorari, it is respectfully submitted that this petition be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PUBLISHED

No. 84-1907(L)

Joan S. Tozer, surviving widow of Eliot F. Tozer, deceased and to her own use and benefit and to the use and benefit as mother and next friend of:
Katherine S. Tozer, surviving minor child of Eliot F. Tozer, deceased and;
Lindsay M. Tozer, surviving minor child of Eliot F. Tozer, deceased and;
Joan S. Tozer, personal representative of the estate of Eliot F. Tozer, deceased,

Appellees,

versus

LTV Corporation, a Texas Corporation; Jones & Laughlin Industries, Inc.; Vought Corporation, a Delaware Corporation,

Appellants.

Bell Helicopter Textron,
Lockheed Corp.,
McDonnell-Douglas Corp.,
United Technologies Corp.,

Amici Curiae.

APPENDIX H

No. 84-1907(L)

Joan S. Tozer, surviving widow of Eliot F. Tozer, deceased and to her own use and benefit and to the use and benefit as mother and next friend of:
Katherine S. Tozer, surviving minor child of Eliot F. Tozer, deceased and;
Lindsay M. Tozer, surviving minor child of Eliot F. Tozer, deceased and;
Joan S. Tozer, personal representative of the estate of Eliot F. Tozer, deceased,

Appellees,

versus

LTV Corporation, a Texas Corporation; Jones & Laughlin Industries, Inc.; Vought Corporation, a Delaware Corporation,

Appellants.

Bell Helicopter Textron,
Lockheed Corp.,
McDonnell-Douglas Corp.,
United Technologies Corp.,

Amici Curiae.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Herbert F. Murray, District Judge. (C/A 81-2134).

Argued: December 5, 1985 Decided: May 27, 1986

Before RUSSELL, HALL and WILKINSON, Circuit Judges.

Drew Pomerance (Kern and Wooley; Charles E. Iliff, Jr.; Semmes, Bowen & Semmes on brief) for Appellants; Michael J. Pangia (Smiley, Olson, Gilman & Pangia; Paul D. Bekman on brief) for Appellees; (Lewis T. Booker; L. Neal Ellis, Jr.; Hunton & Williams on brief) for Amici Curiae.

WILKINSON, Circuit Judge:

In 1980, Lieutenant Commander Eliot Tozer was killed when the Navy plane he was piloting crashed. His widow, Joan Tozer, and his two minor children brought an action against LTV Corporation and its subsidiary Vought Corporation under the Death on the High Seas Act (DOHSA) 46 U.S.C. § 761 *et seq.* and general maritime law, alleging the defective design of a modification to the airplane. The jury returned a verdict in favor of the plaintiffs. Because the government contractor defense shields the contractor from liability for design defects under either a strict liability or a negligence theory when the government has approved reasonably detailed specifications, we reverse and remand for entry of judgment in favor of the defendants.

I.

Tozer's crash occurred off the coast of California while his plane was executing a low-altitude, high speed fly-by of its carrier, the U.S.S. Kitty Hawk. At trial, Joan Tozer contended that the plane had crashed because a panel known as the "Buick Hood" had come off in

mid-flight, causing him to lose control of his Navy RF-8G Reconnaissance plane. The Buick Hood is a hinged panel that permits access to the equipment underneath so that it can be repaired and maintained; the panel should not open during flight.

When the RF-8G was first designed, it had a one-piece panel that wrapped around the top of the aircraft. In order to do maintenance or repair work in the compartment below, the whole panel had to be removed. The Navy asked Vought to modify the panel so that the systems beneath it could be more easily and quickly maintained. Vought cut the panel into three pieces, fixing the center piece to the aircraft, and hinging the two outer pieces along the center line. The non-hinged sides of the hood are fastened with "camlocs," quick fasteners which can be released by a turn of a screwdriver. Tozer contends that it is well known that camlocs often come loose, because of wear, vibration, or corrosion, and that usually many camlocs are installed for safety. Tozer said that Vought was negligent because it did not fasten the panel with redundant camlocs.

Vought contended the design had been carefully analyzed, tested, and found adequate. More fundamentally, Vought argued that it could not be found liable for the design of the aircraft since the Navy had approved it, and the company shared the United States' immunity through the government contractor defense. The district judge instructed the jury that the government contractor defense precluded recovery on the basis of strict liability, but did not instruct the jury on the defense with respect to negligence. The jury returned a special verdict, finding that defendants were negligent in the design of the Buick Hood modification and that the U.S. Navy had reviewed and approved reasonably detailed specifications for the

Buick Hood modification. The jury awarded $350,000 to Joan Tozer, and $50,000 to each of her two daughters.

Vought contends that the district judge should have instructed the jury that the government contractor defense precludes recovery for negligence as well as strict liability. We agree that the defense aplies here to prevent recovery under either theory and reverse and remand for entry of judgment notwithstanding the verdict in favor of Vought.[1]

II.

Traditionally, the goverment contractor defense shielded a contractor from liability when acting under the direction and authority of the United States. *Yearsley v. W. A. Ross Constr. Co.*, 309 U.S. 18, 20 (1940). In its original form, the defense covered only construction projects, *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 448 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043, 104 S.Ct. 711 (1984). Its application to military contractors, however, serves more than the historic purpose of not imposing liability on a contractor who has followed specifications required or approved by the United States government. It advances the separation of powers and safeguards the process of military procurement. We consider each of these values in turn.

The judicial branch is by design the least involved in military matters. "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially

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[1]We do not accept Tozer's argument that defendants waived the government contract defense by not setting it out in their answer. As the district court noted, the delay "was primarily due to the fact that the *McKay* case, which was the sole authority cited in their motion, had only recently been decided."

professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches." *Gilligan v. Morgan,* 413 U.S. 1, 10 (1973) (emphasis in original). Judges possess no power "To declare War . . . To raise and support Armies . . . To provide and maintain a Navy." U.S. Const. art. 1, sec. 8, cl. 11-13. Nor have they been "given the task of running the Army," *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953). In the face of a "textually demonstrable" commitment of an issue to "a coordinate political department," *Baker v. Carr,* 369 U.S. 186, 217 (1962), judicial caution is advisable. Even apart from matters of constitutional text, the reservation of judicial judgment on strictly military matters is sound policy. The judicial branch contains no Department of Defense or Armed Services Committee or other ongoing fund of expertise on which its personnel may draw. Nor is it seemly that a democracy's most serious decisions, those providing for common survival and defense, be made by its least accountable branch of government.

It is difficult to imagine a more purely military matter than that at issue in this case — the design of a sophisticated reconnaissance craft that was flying, on the day of Tozer's death, some 50 to 75 feet above the surface of the water at a speed of 500-550 nautical miles per hour. It should be axiomatic that "considerations of cost, time of production, risks to participants, risks to third parties, and any other factors that might weigh on the decisions of whether, when, and how to use a particular weapon, are uniquely questions for the military and are exempt from review by civilian courts." *In re Agent Orange Product Liability Litigation*, 534 F.Supp. 1046, 1054 n.1 (E.D.N.Y. 1982).

Here, however, the jury was invited to "second-guess military decisions," *see United States v. Shearer,* 105

S.Ct. 3039, 3043 (1985), and to judge the design of a Navy-approved aircraft. Special interrogatory number one inquired of the jury whether defendants were "negligent in the design of the Buick Hood modification," and interrogatory five questioned whether the hood was "defective in that its design rendered it unreasonably dangerous." A group of laymen was thus ineluctably thrust into the intricacies of military technology involving, in the words of the district court, "the structural reaction of the modified Buick Hood panel to aerodynamic forces and loads experienced by the aircraft."

These are judgments, however, which lay men and women are neither suited nor empowered to make. There is a danger in transporting the rubric of tort law and products liability to a military setting and military technology. While jurors may possess familiarity and experience with consumer products, it would be the rare juror — or judge — who has been in the cockpit of a Navy RF-8G off the deck of a carrier on a low level, high speed fly-by maneuver. Moreover, "the United States is required by the exigencies of our defense effort to push technology towards its limits and thereby to incur risks beyond those that would be acceptable for ordinary consumer goods." *McKay,* 704 F.2d at 449-50. What would pose an unreasonable risk to the safety of civilians might be acceptable — or indeed necessary — in light of the military mission of the aircraft. *Cf.* Note, *McKay v. Rockwell International Corp.: No Compulsion for Government Contractor Defense,* 28 St. Louis U.L.J. 1061, 1071 (1984) ("Plaintiff's comparison of the jeep to a civilian passenger vehicle was inappropriate since the two vehicles were not made for similar uses.") Difficult choices, trade-offs, and compromises inhere in military planning that simply find

no analogue in civilian life. "This is not to say that [military] designers are unconcerned with safety. Rather, they attempt to design as safe a plane as possible within the scope of its mission." *Kropp v. Douglas Aircaaft Co.,* 329 F.Supp. 447, 456 (E.D.N.Y. 1971).

The defense protects against judicial interference in military matters in other ways as well. We cannot accept the view that "the danger of interfering with [military] discipline in military contractor cases 'is too remote to be accorded significant weight when the decision only indirectly involves military orders or practices concerning active duty soldiers.' " *Shaw v. Grumman Aerospace Corp.,* 778 F.2d 736, 743 (11th Cir. 1985), *quoting Cole v. United States,* 755 F.2d 873, 879 (11th Cir. 1985). The fact that the challenge here does not involve Tozer's immediate commanding officer or relate to matters of personal discipline is irrelevant. Military contractors ordinarily work so closely with the military, see section III, *infra,* that it is nearly impossible to contend that the contractor defectively designed a piece of equipment without actively criticizing a military decision. Civilian scrutiny of such decisions is generally exerted through executive and legislative oversight on behalf of the public at large, not, as here, through the judiciary at the behest of an individual serviceman. In cases such as these, "members of the armed services would be allowed to question military decisions and obtain relief from actions of military officials." *Bynum v. FMC Corporation,* 770 F.2d 556, 565 (5th Cir. 1985). Trial "would often require members of the Armed Services to testify in court as to each other's decisions and actions." *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 673 (1977). While debate over the safety and necessity of advance weaponry is essential, the First Amendment

does not require that the forum be the courtroom or the vehicle be a lawsuit.

The disallowance of recovery in these actions will not leave servicemen or their survivors without relief. The Veterans' Benefits Act "provides a swift, efficient remedy for the injured serviceman." *Stencel,* 431 U.S. at 673. Thus one classic rationale for tort liability — that of compensation of victims — is less compelling in this context. While the Veterans' Act does not provide all elements of damages in the usual wrongful death action, recovery is more reliable, and not "reduced by the high transaction costs present in ordinary products liability litigation." *McKay,* 704 F.2d at 452, n.11.

Forcing military mishaps into the mold of products liability litigation carries one final drawback. Pilots of the Navy and Air Force, whose service and sacrifice make possible the security of this country, are not the military doubles of civilian motorists. Their lives are led in the company of peril. We can express it no better than Judge Sneed did for the court in *McKay:*

> [Pilots] recognize when they join the armed forces that they may be exposed to grave risks of danger, such as having to bail out of a disabled aircraft. This is partof the job. The Nation sometimes demands their very lives. This is an immutable feature of their calling. To regard them as ordinary consumers would demean and dishonor the high station in public esteem to which, because of their exposure to danger, they are justly entitled.

704 F.2d at 453.

III

The second set of reasons for the government contractor defense also has its roots in military soil. Permitting recovery for design defects under any theory of liability risks altering the nature of the procurement process. Specifically, we anticipate that in the absence of the defense, there would be a decrease in contractor participation in design, an increase in the cost of military weaponry and equipment, and diminished efforts in contractor research and development.

Contractor participation in design is essential to the development of a military force that is competitively equipped. Equipment designs often are the result of "continuous back-and-forth" between the military and the contractor. *Koutsoubos v. Boeing Vertol,* 755 F.2d 352, 355 (3d Cir.), *cert. denied,* ___ U.S. ___, 106 S.Ct. 72 (1985). The contractor and the military pool their expertise, matching the latest advances in military technology with the specific dictates of the mission. We recognize this back-and-forth as a reality of the procurement process, as well as a valuable part of that process; indeed if military technology is to continue to incorporate the advances of science, it needs the uninhibited assistance of private contractors.

Here the testimony at trial indicated that Vought worked closely with the Navy in developing the specifications for the aircraft. Vought's project manager for the RF-8G program testified that the engineering change proposal that included the Buick Hood modification was "a continual source of discussion" between Vought and the Navy, and that Navy engineers visited Vought every few months for progress reviews. The contractor's participation in design — or even its origination of specifications — does not constitute a

waiver of the government contractor defense. If the defense were to be waived by such participation, the contractor would be trapped between its fear of liability and its desire to provide needed ideas and information. The "incentives for suppliers of military equipment to work closely with and to consult the military authorities in the development and testing of equipment" would be lost. *McKay,* 704 F.2d at 450. Without the defense, "military contractors would be discouraged from bidding on essential military projects." *Bynum v. FMC,* 770 F.2d at 566. Thus the defense will be permitted to a participating contractor so long as government approval of design "consists of more than a mere rubber stamp." *Schoenborn v. Boeing,* 769 F.2d 115, 122 (3d Cir. 1985). If there is genuine governmental participation in the design, "the defense is available." *Id.*

Finally, disallowing the government contractor defense might raise the already high costs of military equipment. "Military suppliers, despite the government's immunity, would pass the cost of accidents off to the United States through cost overrun provisions in equipment contracts, through reflecting the price of liability insurance in the contracts, or through higher prices in later equipment sales." *McKay,* 704 F.2d at 449. Such pass-through costs would, of course, defeat the purpose of the immunity for military accidents conferred upon the government itself. *Stencel,* 431 U.S. at 673. While distribution of the costs of mishaps to the consuming public may be a familiar feature of products liability law, we are loathe to grant courts and juries a similar power to swell the public costs of meeting the nation's requirements in national security. Though one court has speculated that tort liability would provide legal incentives for "better-designed planes and fewer costly accidents," *Shaw,* 778 F.2d at 742, that judgment

is not a matter for the judicial economists but for the Executive in its dealings with contractors and for the Congress in defining the scope of immunities under the Federal Tort Claims Act.

IV.

There remains the application of the elements of the military contractor defense to the facts of this case. In *McKay,* the court held that

> a supplier of military equipment is not subject to [strict liability in tort] for a design defect where: (1) the United States is immune from liability under *Feres* and *Stencel*,[2] (2) the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment, (3) the equipment conformed to those specifications, and (4) the supplier warned the United States about patent errors on the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States.

704 F.2d at 451.

There is no question that Vought qualifies for the government contractor defense under this test. It is undisputed that the United States was itself immune from liability and that the Buick Hood modification

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[2]In *Feres v. United States*, 340 U.S. 135 (1950), the government was held not liable under the Federal Tort Claims Act for injuries to servicemen in the course of military service. In *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666 (1977), the United States was not required to indemnify a third party for damages paid by it to a member of the Armed Forces injured in the course of military service.

conformed to specifications. The jury specifically found that the Navy reviewed and approved "reasonably detailed specifications for the Buick Hood modifications," and, further, that the contractor did not fail "to notify the Navy of dangers created by the specifications which were known to defendants but unknown to the Navy."

Nevertheless, the district court upheld the verdict for Tozer on the basis of the jury's findings that defects in the design of the Buick Hood proximately caused plaintiff's death. The district court considered the defense "applicable to a cause of action based on strict liability," but unavailable to a "government contractor who is alleged to have established negligent design specifications."

In so holding, the trial court was in error. The defense applies "equally well to design defect cases based on negligence and/or breach of warranty claims." *Tillett v. J. I. Case Co.,* 756 F.2d 591, 597 n.3 (7th Cir. 1985); *see also Schoenborn.* The policies discussed earlier apply forcefully in either a negligence or a strict liability context. Courts are ill equipped to make military judgments, whatever a plaintiff's theory of recovery. In this case, the jury was instructed that the government contractor defense barred recovery on strict liability, in part to prevent second-guessing of military decisions. But the jury still was compelled to evaluate the negligence claim, and thereby second-guess a design that the United States Navy had sanctioned. The danger that contractors will participate less and charge more stems from the threat of liability for government-approved technology, not from the particular theory of recovery.

In holding that the government contractor defense bars recovery on a theory of negligence as well as strict

liability, we join the growing ranks of circuit courts that recognize the utility of the defense and its inescapable function in the deflection of unwarranted judicial oversight over matters of procurement and defense.[3] *Koutsoubos v. Boeing Vertol,* 755 F.2d 352 (3d Cir. 1985); *Bynum v. FMC,* 770 F.2d 556 (5th Cir. 1985); *Tillett v. J. I. Case,* 756 F.2d 591 (7th Cir. 1985); *McKay v. Rockwell Int'l Corp.,* 704 F.2d 444 (9th Cir. 1983). *But see Shaw v. Grumman Aerospace,* 778 F.2d 736 (11th Cir. 1985). This case involves no more than a standard application of such principles. The judgment of the district court is accordingly reversed and remanded for entry of judgment in favor of defendants.

REVERSED AND REMANDED.

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[3]Though the cause of action here was brought under federal law, the defense would apply equally to suits under the diversity jurisdiction. "With regard to the government contractor defense, most of the courts that have considered the matter have found that, at least when military design specifications provided by the government are at issue, product liability actions are likely to involve matters that are subject to exclusive federal control and necessitate the limited imposition of federal common law." *Bynum,* 770 F.2d at 567,*et seq.* The fact that a claim arises under state law does not, of course, preclude a federal defense in an area of paramount federal interest. *Id.*; Note, *Government Contract Defense: Sharing the Protective Cloak of Sovereign Immunity After McKay v. Rockwell International Corp.,* 37 Baylor L. Rev. 181, 214 (1985).

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

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PERRY D. JENKINS, et al., Plaintiffs, vs. WHITTAKER CORPORATION, etc., Defendant.	NO. 80-0195

DEPOSITION OF JOHN MICHAEL MOERLS
Taken before Joanne C. Bushaw, a Notary Public
In and for the County of Monterey
State of California

June 3, 1983

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APPENDIX I

Q. In the absence of a need to save a life, would you personally approach an atomic simulator which had fired [sic] inside the barrel that you could see?

MR. THOMAS: Excuse me, Colonel. Before you answer, let me object to the question on the ground that it's irrelevant, calls for the Colonel's personal feelings and opinion, hypothetical, assumes facts not in evidence, contains insufficient facts for an adequate response, requires speculation, and is without foundation.

MR. GREENBERG: You can answer the question.

THE WITNESS: Would I, in the absence of a need to save a life?

MR. GREENBERG: Yes.

THE WITNESS: No.

MR. THOMAS: I'll move to strike the answer for the reasons previously noted.

BY MR. GREENBERG:

Q. Given your background, training, and experience in EOD — Explosive Ordinance Disposal — as well as the other training you've had, would you expect that a person who had training in pyrotechnics to know that you ought not to approach an atomic simulator that's observed to be on fire in the absence of a need to save a life?

MR. THOMAS: Same objections. It's also vague, ambiguous, irrelevant, requires speculation. But please go ahead and respond.

THE WITNESS: I think I got lost on that one. With any person —

MR. GREENBERG: No. You can read the question back.

(The record was read.)

THE WITNESS: Yes.

MR. THOMAS: And I'll move to strike for the reasons previously noted.

BY MR. GREENBERG:

Q. Do you recall whether, on May 11, 1978, when you arrived at the accident site, you waited any particular period of time before making the initial approach you've described?

MR. THOMAS: Object to that as vague and ambiguous.

THE WITNESS: I recall asking when this had taken place, and it had taken place many hours ago. I don't recall the time frame or anything like that, but it was well past the normal wait period for grenades, or simulators, or the general waiting period, which is 30 minutes, as a general rule.

MR. THOMAS: Move to strike as non-responsive the last portion of the answer.

BY MR. GREENBERG:

Q. To your knowledge, is there a normal waiting period that persons should wait before approaching an atomic simulator that fails to fire?

MR. THOMAS: Objection, without foundation. Again calling for a hypothetical answer, assumes facts not in evidence with insufficient information to answer, requires speculation. Please go ahead.

MR. GREENBERG: Mr. Thomas is giving you all the objections he learned in law school.

THE WITNESS: Yes.

BY MR. GREENBERG:

Q. What is the wait time, Colonel?

MR. THOMAS: Excuse me, Colonel.

THE WITNESS: I cannot recall the wait period, but it is in the TM — technical manual.

MR. THOMAS: Same objections, and move to strike for the same reasons.

BY MR. GREENBERG:

Q. In Exhibit 1, your statement, the last sentence I believe says, "I will — do you see that?

A. Yes.

Q. Could you read that, please, for the record?

MR. THOMAS: Let me just object to the Colonel's reading the last sentence, based upon inadequate foundation established for use of the statement, also without foundation as to his qualifications to give such an opinion in this case. But go ahead an respond to the question.

THE WITNESS: Okay. I am commenting that approaching a smoking fire on any munition, pyrotechnic should be avoided where possible, and limit the number of personnel exposed to a potential hazard where possible.

MR. THOMAS: Also, I would like to move to strike that answer and interpose two additional objections. It's assuming facts not in evidence, and it's not based upon the Colonel's personal knowledge.

BY MR. GREENBERG:

Q. Can you recall the circumstances that caused you to make that comment?

A. I believed that these are generally good guidelines to follow on using demolition, or ordnance, or pyrotechnics, and that this investigation would yield something, and perhaps one of the things it may yield would be some general statements about operating on the ranges and so on and that might be included.

MR. THOMAS: Move to strike as non-responsive, and also for the reasons previously noted.

BY MR. GREENBERG:

Q. In the course of your investigation of this incident, do you have any recollection of learning whether or not any of the three individuals who went down range after the initial malfunction approached the fired simulator at a time when it had either smoke or fire coming from it?

MR. THOMAS: Objection. Assumes facts not in evidence, and requries a response based upon hearsay. Go ahead and answer.

THE WITNESS: Yes.

BY MR. GREENBERG:

Q. And what did you learn?

MR. THOMAS: Excuse me. Same objections.

THE WITNESS: That after the first one fired, that second one malfunctioned, the three — the individuals went down range, and this other one was still smoking.

MR. THOMAS: Move to strike for the reasons previously stated.

BY MR. GREENBERG:

Q. Do you recall whether that knowledge that you've described, whether or not that was a factor in your making these observations you just made at the end of your statement?

MR. THOMAS: Objection, no foundation. Again, we are assuming facts not in evidence, and it's also leading, and goes beyond the scope of what the Colonel was at the scene to do. But go ahead and answer.

THE WITNESS: Yes.

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

PERRY D. JENKINS, ANNABELLE JENKINS, AND STUART A. KANEKO AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JEFFREY SCOTT JENKINS, DECEASED,	
PLAINTIFFS,	NO. 80-0195
vs.	
WHITTAKER CORPORATION, DBA BERMITE CORPORATION, A DIVISION OF WHITTAKER CORPORATION, A CALIFORNIA CORPORATION,	
DEFENDANTS.	

DEPOSITION OF THOMAS CHARLES DAPPERT
SAN DIEGO, CALIFORNIA
DECEMBER 1, 1981

REPORTED BY MARIJANE MORALES, CSR NO. 3923

APPENDIX J

Q THEN WHAT DID YOU DO?

A WELL, THAT IS WHEN THE INFANTRY CAME AS WE WERE SETTING UP WAITING FOR THEM.

Q THEN WHAT HAPPENED?

A THEY PULLED UP. CAPT. FITZGERALD WAS ALL EXCITED.

Q CAN YOU TELL ME WHAT YOU MEAN BY "ALL EXCITED"?

A WELL, HE WAS LIKE A LITTLE KID WITH A NEW TOY.

Q THEN WHAT HAPPENED?

A WE WERE INSPECTING THE DEMO. HE GOT OFFENDED BY THAT.

Q WHY WAS HE OFFENDED?

A WE TOLD HIM THAT SOME OF IT LOOKED PRETTY OLD.

Q WHAT DID HE SAY?

A SAID, "THAT'S OKAY."

Q THEN YOU STATED THAT, "I ASKED CAPT. FITZGERALD IF HE KNEW WHAT HE WAS DOING."

WHY DID YOU ASK CAPT. FITZGERALD IF HE KNEW WHAT HE WAS DOING?

A BECAUSE MY LIFE WAS IN DANGER.

Q WHY DID YOU FEEL YOUR LIFE WAS IN DANGER?

A BECAUSE I DIDN'T TRUST HIM. I DIDN'T THINK HE KNEW WHAT HE WAS DOING.

Q WHY DIDN'T YOU THINK HE KNEW WHAT HE WAS DOING?

A BECAUSE I DIDN'T KNOW HIM. I ALWAYS ASSUME THAT THEY DON'T KNOW WHAT THEY ARE DOING.

Q WHO IS "THEY"?

A INFANTRY PEOPLE.

Q WHY DO YOU ASSUME THAT INFANTRY PEOPLE DON'T KNOW WHAT THEY ARE DOING?

A BECAUSE THEY HAVE NEVER HAD ANY TRAINING IN THE AREA.

Q IN THE AREA OF DEMOLITION?

A RIGHT.

Q ALL RIGHT. I AM QUOTING FROM A STATEMENT. "HE SAID, 'YES,' SO I LEFT THE SITE AND WENT BACK UP THE RANGE TO THE FIRING POINT."

DID HE SAY ANYTHING ELSE IN ADDITION TO "YES" TO YOU?

A NOT THAT I REMEMBER.

Q DO YOU RECALL HIM EVER TELLING YOU WHAT HIS QUALIFICATIONS WERE FOR SETTING UP THE SIMULATOR?

A NO.

Q WHEN YOU SAY, "I DID NOT SEE EITHER SIMULATOR HOOKED UP," WHAT EXACTLY DO YOU MEAN BY THAT?

A WELL, I SAW THEM, YOU KNOW, TAKE THE LID OFF SIMULATOR NO. 1 PULLING STUFF OUT, THE SOUND SIMULATOR. THAT IS ALL I CAN REALLY REMEMBER, THEM PULLING OUT THE SOUND SIMULATOR. AT THAT TIME THAT IS WHEN I ASKED CAPT. FITZGERALD IF HE KNEW WHAT HE WAS DOING.

Q DID ANYTHING THAT HE DID INDICATE TO YOU THAT HE DIDN'T KNOW WHAT HE WAS DOING?

MR. SELBY: OBJECTION. CALLS FOR EXPERTISE.

THE WITNESS: HE WASN'T LISTENING TO ANYBODY. I DIDN'T LIKE THAT.

BY MS. GOODWIN:

Q CAN YOU RECALL SOMEONE WHO WAS TRYING TO INSTRUCT HIM THAT HE DIDN'T LISTEN TO?

A NO. [Answer changed by witness to "EVERYBODY"]

Q THEN YOU STATE, "I DIDN'T LIKE THE WAY ANYTHING WAS HAPPENING ON THE RANGE THAT DAY."

CAN YOU EXPLAIN THAT STATEMENT?

A WELL, PREVIOUS DEMO CLASSES, WE HAD ALWAYS BEEN IN CHARGE.

Q "WE" MEANING?

A THE ENGINEERS.

Q OKAY.

A AND CAPT. FITZGERALD WASN'T BEING REAL COOPERATIVE. HE WASN'T LETTING US FOLLOW OUR LESSON PLAN. YOU KNOW, OUR OUTLINE WE HAD FOR THE CLASS. WE HAD KIND OF DECIDED WE WERE GOING TO SAVE THE SIMULATORS FOR THE END [Witness added "WHEN WE LEARNED OF THEM"], AND THEN HE WANTED RIGHT AWAY TO TAKE THEM DOWNRANGE AND — YOU KNOW, FIRST OFF. HE JUST MORE OR LESS TOOK OVER OUR CLASS.

I WAS OFFENDED BY IT, ANYWAY. I WAS A LITTLE SCARED, TOO.

Q WHO DID HE TAKE OVER THE CLASS FROM?

A SGT. STRICKLER AND MYSELF.

Q IS THERE ANYTHING ELSE YOU CAN THINK OF WHY YOU WERE AFRAID?

A JUST THAT I HAD THE FEELING THAT HIS ATTITUDE WAS — HE WAS IN A REAL BIG HURRY AND WASN'T REALLY THINKING ABOUT WHAT HE WAS DOING. THAT'S WHAT MADE ME WANT TO GET AWAY.

Q WERE THERE ENGINEERS ON THE RANGE THAT DAY?

A YES.

Q TO YOUR KNOWLEDGE, WERE THOSE ENGINEERS ON THE RANGE TO SET UP THE ORDNANCE?

A WE ALL WENT OUT THERE TOGETHER EARLIER IN THE MORNING.

Q WERE THOSE ENGINEERS STOPPED FROM SETTING UP THE ATOMIC SIMULATOR BY CAPT. FITZGERALD?

MR. SELBY: OBJECTION, SPECULATION. I THINK THE WITNESS SAID HE WAS ASLEEP.

MS. GOODWIN: NO, HE WASN'T, BUT OBJECTION NOTED.

THE WITNESS: USUALLY WHEN THEY WERE SETTING UP, CAPT. FITZGERALD JUST PRETTY MUCH WEASLED HIS WAY INTO THE MIDDLE OF EVERYTHING.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on August 22, 1986, I served the within *Reply in Support of Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Paul F. Cronin, Esq.
John D. Thomas, JR., Esq.
1900 Davies Pacific Center
841 Bishop Street
Honolulu, Hawaii 96813

Allan S. Haley
419 Broad Street, Suite B
Nevada City, California 95959

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 22, 1986, at Los Angeles, California.

Sharon L. Stewart
(Original signed)